removed wastes from TDI production facilities, drummed the wastes for transport to Big D, and loaded the drums onto the transporter's trucks. *Id.* GenCorp employees also spilled hazardous substances on the ground at the TDI Plant site, causing contamination of Fields Brook, an adjacent waterway. *Id.* at 83a, 84a. A GenCorp engineer working at the TDI Plant signed and approved service orders for transporting residue offsite. *Id.* at 8a, 84a-85a.

C. EPA's Section 106 UAOs And The Lawsuits Against Olin Under Section 107(a)

In 1983, the United States Environmental Protection Agency ("EPA") placed Big D and Fields Brook (including the TDI Plant) on the National Priorities List of severely contaminated sites to be remediated under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"), and EPA later declared Olin to be a "potentially responsible party" ("PRP") for Big D. Pet. App. 10a. EPA engaged consultants to investigate the Big D site and recommend remedial alternatives. *Id.* at 10a. In September 1989, EPA released its final remedy decision for Big D, *id.*, requiring excavation and incineration of all contaminated soils and treatment of the groundwater at the landfill.

An effort by Olin and EPA to agree on terms for implementation of the remedial plan by Olin failed after several months of negotiations. Pet. App. 59a. Then, on March 27, 1990, EPA issued a Unilateral Administrative Order ("UAO") under CERCLA § 106, 42 U.S.C. § 9606(a), directing Olin to perform the remedy at Big D. *Id.* In a section of the order headed "Penalties for Noncompliance," EPA warned Olin that severe monetary sanctions are available under CERCLA § 106(b), 42 U.S.C. § 9606(b), for any willful violation or refusal to comply, including fines of up to "$25,000 for each day in which such violation occurs or such failure to comply continues." Big D UAO, Mar. 27, 1990, ¶ 52. Rather than

risk significant civil penalties, Olin complied. Excavation at Big D commenced in September 1992. Pet. App. 61a. Through 1999, the cutoff date for the damages phase of this case, Olin had spent more than $60 million to comply with the UAO for Big D.[2]

To force Olin's hand still further before the cleanup started, EPA sued Olin under CERCLA § 107(a), 42 U.S.C. § 9607(a), in the United States District Court for the Northern District of Ohio. *United States v. Olin Corp.*, No. 4:91 CV1731 (N.D. Ohio filed Sept. 3, 1991). EPA's suit asserted that Olin had arranged for the disposal of hazardous substances at Big D, causing extensive soil and groundwater contamination, and that a comprehensive remediation project had to be implemented for the site, as called for in EPA's final remedial decision. Compl., ¶¶ 6, 11-13. In particular, EPA alleged in its complaint against Olin that

> The United States has incurred response costs, and will continue to incur response costs . . . including the costs for removal and remedial actions as defined in [CERCLA], to respond to the release and threatened release of hazardous substances at the Big D Campground Site.

Id., ¶ 22. Contrary to GenCorp's characterization, EPA did not bring the Section 107 claim merely "to recover oversight costs." Pet. 5 n.1. Rather, the government actually sought a judgment against Olin for "all response costs incurred by the

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[2] EPA conducted a similar process for responding to contaminants in Fields Brook and adjoining properties. Olin was named a PRP for the TDI Plant, GenCorp was named for its PVC plant, and other companies were named for their manufacturing facilities located along the waterway. Pet. App. 58a. EPA issued a Section 106 UAO for the Fields Brook site on March 22, 1989, ordering Olin, GenCorp, and other PRPs to carry out additional investigations and remedial design and pre-design activities. *Id.* at 58a-59a. A multi-million dollar outlay was required to comply with the Fields Brook UAO, which Olin paid to conduct investigations, feasibility studies, and other remedial actions related to contamination of the TDI Plant site. *Id.* at 61a & n.8.

United States" for Big D and a declaration that "Olin will be liable for all future costs incurred by the United States" for response actions going forward. Compl., at pp. 6-7.[3]

Faced with the UAO to remediate Big D and, if Olin declined, the threat of Section 106 civil penalties and a money judgment in EPA's Section 107(a) action requiring Olin to pay the government for cleaning up the site, Olin yielded to EPA's demands and performed the Big D cleanup in accordance with the UAO. After the remediation project was well underway, Olin and EPA settled EPA's Section 107(a) action pursuant to a consent decree entered on May 5, 1994, under which Olin agreed to pay all of the government's response costs, as well as the government's costs for supervising Olin's cleanup activities.[4] Consent Dec. ¶¶ 10, 13.

D. Proceedings In The District Court

GenCorp filed this action in October 1993, seeking a declaration that GenCorp was not liable for Big D, Fields Brook, and certain other sites, under CERCLA §§107(a) and 113(f), 42 U.S.C. §§ 9607(a), 9613(f). Pet. App. 11a. GenCorp alleged that it neither operated the TDI Plant with Olin nor arranged with Olin for the disposal of TDI Plant wastes at Big

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[3] Two years earlier, in September 1989, EPA filed suit under Section 107(a) of CERCLA for the Fields Brook site against Olin, GenCorp, and other PRPs. *United States v. GenCorp Inc.*, No. 5:89 CV1866 (N.D. Ohio filed Sept. 29, 1989). In that litigation, the government likewise sought recovery for response costs incurred by EPA in connection with releases and threatened releases of hazardous substances. Olin, GenCorp, and several other PRPs settled the government's Section 107 action for Fields Brook by entering a consent decree approved by the court on August 6, 1992, under which the settling parties reimbursed the government's response costs, plus interest. Pet. App. 60a-61a.

[4] In the event Olin failed to complete the Big D cleanup in accordance with the UAO, the consent decree expressly reserved the government's right to file suit under CERCLA in the future against Olin for injunctive relief, for the government's future response costs, and for any other relief relating to the site. Consent Dec. ¶ 17.

D. *Id.* at 62a. Olin promptly counter-claimed, alleging that GenCorp was both an operator of the TDI Plant and an arranger for offsite disposal of TDI residue and other hazardous substances. *Id.* Olin's counterclaim sought a monetary judgment under Section 107(a) and Section 113(f) of CERCLA for at least one-half of Olin's response costs and a declaratory judgment holding GenCorp liable for any additional response costs as Olin incurs them in the future.

The trial judge dismissed Olin's Section 107(a) claim after the court of appeals ruled, in *Centerior Servs. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), that PRPs are not eligible to recover from other PRPs under that section of CERCLA. Pet. App. 11a. The district court issued a written opinion in 1999, finding GenCorp liable under CERCLA for the Fields Brook site, as an "operator" of the TDI Plant and "owner" of the land, and, for Big D, as an "arranger" for the disposal of hazardous substances at that site. Pet. App. 85a-86a, 91a. After further proceedings, another opinion covering damages issues followed in May 2002.

Before the court entered final judgment, GenCorp sought to have these rulings nullified in light of the Fifth Circuit panel decision in *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134 (5th Cir. 2001) ("*Aviall I*"). The issue in that case was whether a pending or completed civil action under Section 106 or Section 107(a) is a prerequisite to the filing of a Section 113(f)(1) contribution claim, 42 U.S.C. § 9613 (f)(1). A divided panel of the Fifth Circuit answered that question in the affirmative. 263 F.3d at 145. The Fifth Circuit then granted a petition for rehearing *en banc*, 278 F.3d 416 (5th Cir. 2001), and the United States filed a brief as *amicus curiae* urging the *en banc* court to affirm.

Pointing to these developments, GenCorp asked the district court to dismiss Olin's Section 113(f)(1) claim and revoke its liability determination. While GenCorp's motion was pending in the district court, the *en banc* Fifth Circuit reversed the

panel's decision. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002) ("*Aviall II*"). Nevertheless, GenCorp again urged the trial judge to grant its motion by adopting the analysis of the United States and the *en banc* dissent. The district court denied GenCorp's motion, and entered judgment for Olin under Rule 54(b).[5]

E. Proceedings In The Court Of Appeals

GenCorp appealed, contending that the trial judge erred in finding GenCorp liable as an arranger for the cleanup of Big D. GenCorp did not, however, challenge the determination of owner and operator liability for the Fields Brook site, and thus the judgment for that site, which includes the TDI Plant, is now final. In attacking the district court's judgment of "arranger" liability, GenCorp argued, *inter alia*, that it did not "own or possess" the wastes within the meaning of CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), and that the judgment conflicts with this Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998).

The court of appeals affirmed. Pet. App. 3a-32a. As to the claim that GenCorp did not "own or possess" the TDI Plant wastes, the court observed first that "GenCorp did not squarely join this issue at the district court level . . . ." *Id.* at 24a. In any event, the court held GenCorp's argument is mistaken. As the court explained, "to say that the statute requires ownership or possession of the waste does not establish what evidence will satisfy the requirement or, more particularly, whether constructive ownership or possession will suffice." *Id.* at 25a.

The court ruled that the plain meaning of the statutory phrase "owned or possessed" includes "constructive" as well as "literal" ownership or possession, and that evidence of "control over hazardous waste" may be used to demonstrate

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[5] The district court retained jurisdiction of GenCorp's state-law claims for breach of contract. Pet. App. 12a-13a.

constructive ownership and possession. *Id.* at 25a-27a. The record evidence showing GenCorp's control over the hazardous TDI waste included: (a) GenCorp's financing of TDI Plant construction; (b) GenCorp's equal representation on the TDI Committee; (c) GenCorp's approval of design plans, capital appropriations, and budgets, "all of which contemplated continued offsite waste disposal"; and (d) the district court's finding—not challenged on appeal—that GenCorp was an "operator" under CERCLA by virtue of its own actions at the TDI Plant specifically related to pollution. *Id.* at 27a.

The court of appeals also rejected GenCorp's argument that the arranger liability judgment conflicts with this Court's ruling in *Bestfoods*. In that case, this Court addressed standards governing CERCLA "operator" liability in the context of a corporate parent being held liable for cleaning up a subsidiary's contaminated facility. Here, however, the dispute concerns the "arranger" (not "operator") liability of GenCorp for causing contamination at an offsite disposal facility. Pet. App. 23a-24a. Because *Bestfoods* does not alter "the basic principles for ascertaining 'arranger' liability," the court of appeals concluded that arranger liability is appropriate as long as the "alleged violator . . . independently satisf[ies] the test for CERCLA liability" under that provision. *Id.* at 24a. The test for arranger liability was satisfied based on GenCorp's own considerable involvement in waste disposal. *Id.*

After the district court rejected GenCorp's effort to challenge the propriety of Olin's contribution counterclaim under Section 113(f)(1), GenCorp elected not to appeal that ruling. Although GenCorp filed a statement in the court of appeals listing the so-called *Aviall* issue as one of GenCorp's expected grounds for appeal,[6] GenCorp then chose to omit any mention of the issue from its opening brief and reply brief in the court of appeals. GenCorp filed its opening brief on May

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[6] GenCorp filed its statement in the court of appeals after Cooper Industries petitioned for certiorari in this Court.

30, 2003, more than a month after this Court invited the Solicitor General to express the views of the United States on the petition filed by Cooper Industries. This Court granted review on January 10, 2004, and the merits briefs in the case (including a further *amicus* brief from the United States supporting Cooper Industries) all were filed well before the court of appeals heard oral argument in the present case on June 11, 2004. Yet GenCorp said nothing about the supposed *Aviall* issue.

The first time that GenCorp gave the court of appeals any indication that this Court's decision in *Cooper Industries* might have some bearing on the appeal was after the panel unanimously affirmed the judgment of the district court. GenCorp then petitioned for panel and *en banc* rehearing on the "own or possess" and "*Bestfoods*" issues. In the petition, GenCorp reported that *Cooper Industries* had been argued in this Court, and it asserted that, if the judgment of the Fifth Circuit was reversed, then "Olin's contribution claim in this case may be barred." Pet. for Reh'g at 14. GenCorp acknowledged that it had chosen not to raise the Section 113(f)(1) issue on appeal. GenCorp cited the *en banc* Fifth Circuit's ruling in *Aviall II* as the reason for its decision, but it did not explain why, after pursuing the Section 113 (f)(1) issue in the district court *after Aviall II*, it nevertheless elected to abandon the issue in the court of appeals. *Id.* After this Court decided *Cooper Industries* and reversed the *en banc* Fifth Circuit, 125 S. Ct. 577 (2004), GenCorp moved to vacate the judgment of the court of appeals. It also sought and obtained leave to file a reply in support of its petition for rehearing. The reply sought reversal on the ground that the "during or following" requirement of Section 113(f)(1), as construed by this Court in *Cooper Industries*, was not satisfied.

Olin responded that GenCorp had waived the issue decided in *Cooper Industries*, as well as the question whether a UAO issued under Section 106 qualifies as a "civil action" under that section for purposes of satisfying the "during or follow-

ing" requirement of Section 113(f)(1). As noted above, neither of these issues was mentioned in GenCorp's briefs on appeal. Olin also argued that the "during or following" requirement in Section 113(f)(1) was satisfied by the Section 107(a) cost recovery actions brought against Olin before Olin sought contribution from GenCorp.[7]

The court of appeals denied GenCorp's motion to vacate the judgment on January 21, 2005. The court denied GenCorp's petition for rehearing on March 29, 2005. Pet. App. 2a.

ARGUMENT

The unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. It is also highly fact-specific, involving the legal consequences under CERCLA of a unique business relationship formed more than 40 years ago for the construction, management, and operation of a chemical manufacturing plant. Further review is not warranted.

GenCorp's effort to take advantage of this Court's decision in *Cooper Industries* is flawed in several respects.

First, GenCorp chose not to raise on appeal any issue regarding whether Olin's contribution counterclaim satisfied the requirements of CERCLA § 113(f)(1). Though it pursued

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[7] EPA's two lawsuits against Olin are not the only Section 107 actions that preceded Olin's contribution claim under Section 113(f)(1). Because Olin sought contribution as a *counterclaim* in GenCorp's lawsuit for a declaration of no liability to Olin under Section 107, Olin's claim was brought, quite literally, "during" GenCorp's Section 107 action against Olin. The district court's judgment also holds GenCorp liable for a landfill known as the Reserve Environmental Site ("RES"), which was used, along with Big D, for the disposal of TDI Plant wastes. Pet. 10-11 n.2. Olin was sued under Section 107(a) for RES by PRPs that owned and used that landfill. *Reserve Envtl., Inc. v. Detrex Corp.*, No. 4:93CV1157 (N.D. Ohio, filed as third party complaint against Olin on Nov. 12, 1993). Olin later amended its claim in this case to recover from GenCorp a portion of the settlement that ultimately was reached in the RES action.

such an argument in the district court, GenCorp did not mention any such issue in the court of appeals until it filed its petition for rehearing. GenCorp thus waived its opportunity to seek review in this Court on this ground.

Second, with respect to each of the contaminated sites at issue, before Olin filed any contribution claim against GenCorp, Olin already had been sued under CERCLA § 107(a). In particular, as to each site, EPA or a private party sued Olin under Section 107(a) before Olin sought contribution from GenCorp. Moreover, in this very case, GenCorp itself sued Olin for declaratory relief under Section 107(a) before Olin filed the contribution counterclaim that led to the judgment entered by the district court. Thus, Olin's contribution claim against GenCorp was filed "during or following" a civil action under Section 107(a), and the requirement of Section 113(f)(1) addressed in *Cooper Industries* was fully satisfied. This case therefore presents no occasion to consider the issue reserved in *Cooper Industries* (125 S. Ct. at 584 n.5), namely, whether a UAO issued under Section 106 qualifies as a "civil action under Section 106" within the meaning of the contribution provision in Section 113(f)(1).

Third, the issue reserved in *Cooper Industries* was not decided by the court of appeals in this case, and, as far as we are aware, it has not been decided by any other court of appeals either.[8] The issue was not briefed by the parties in the court below. This Court normally does not consider in the first instance issues not previously addressed in the courts of appeals. Petitioner's effort to persuade the Court to depart from this salutary practice is misguided. This is especially so because Olin proceeded against GenCorp in the district court through *both* a contribution claim under Section 113(f)(1) and an action to recover response costs under Section 107(a).

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[8] In dictum, the Fifth Circuit panel in *Aviall I* stated that a UAO issued under CERCLA § 106 *does* qualify as a "civil action under Section 106" for purposes of CERCLA's contribution provision. 263 F.3d at 140 n.5, 145.

Although the district court dismissed the Section 107 claim in reliance on the court of appeals' decision in *Centerior*, this Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), indicates that the district court's judgment in Olin's favor could be sustained under Section 107, even if Section 113 were for some reason unavailable.

Fourth, even if the Court were to reach the Section 106 issue that GenCorp seeks to present, GenCorp's position is incorrect on the merits. When EPA issues a UAO under Section 106, the recipient (like Olin in this case) is in no sense a "volunteer" in undertaking a cleanup. Rather, the cleanup is performed under government compulsion and with the threat of $25,000 per day sanctions if the UAO is not obeyed. There is no indication that Congress wanted to preclude an entity subject to such government compulsion from seeking contribution from other potentially responsible parties. The phrase "civil action" as used in Section 113(f)(1) is not defined in CERCLA, but it is broad enough to include administrative action such as a UAO. Once the government's enforcement authority has been brought to bear on a company like Olin, Section 113(f)(1) permits that company, while it is performing the cleanup ordered by the government, to seek contribution from other potentially responsible entities.

In a last-ditch effort to prolong this litigation, GenCorp suggests that, as an alternative to simply granting the petition, the Court should consider granting the petition, vacating the judgment, and remanding for further consideration in light of *Cooper Industries*. This proposal is without merit. In the first place, as GenCorp acknowledges (Pet. 7), *Cooper Industries* expressly reserved the issue petitioner seeks to have decided. Because *Cooper Industries* did not resolve or even discuss that issue, the decision provides no basis for further consideration by the court of appeals. Moreover, petitioner made extensive presentations about the *Cooper Industries* decision to the court of appeals, both in a motion to vacate the judgment and in a reply memorandum in support of the

petition for rehearing. Neither was successful, and, for all the reasons already discussed, there is no reason to believe that the court of appeals would act differently now.

Although GenCorp concentrates primarily on arguments that it did *not* make on appeal and that the court of appeals did not decide, it devotes the final four pages of its petition (Pet. 14-17) to two points that actually were litigated below. Neither warrants further review here.

First, CERCLA's "own or possess" requirement for arranger liability was satisfied here. GenCorp was actively involved in waste removal and made numerous decisions governing the disposal of hazardous TDI waste. The court of appeals correctly ruled that the control GenCorp exercised in matters concerning waste disposal "suffices to establish constructive ownership and possession" of the hazardous waste. Pet. App. 27a. No court has held that the "owned or possessed" language in CERCLA § 107(a)(3) does not include constructive ownership or possession, and there is no reason to believe that Congress used these words in CERCLA with a special definition more restrictive than that employed in numerous other federal statutes. Absent some contrary indication, ownership or possession includes constructive ownership or possession, as the court of appeals correctly held. *Id.* at 25a-26a. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), does not suggest otherwise. The term "possessed" does not even appear in the statutory provision at issue in *Dole Food*, which considered whether a governmental entity is "owned" by a foreign state under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b)(2). Because it construes different language in an entirely separate statute, *Dole Food* does not govern the CERCLA provision at issue here. And, in any event, with respect to the large quantities of hazardous waste that GenCorp employees themselves placed in drums and loaded for disposal, GenCorp *actually* possessed the waste at issue.

Second, contrary to GenCorp's hyperbole, the court of appeals' ruling did not and would not permit "an end run around the *Bestfoods* liability limits." Pet. 17. In *Bestfoods*, the Court held that a parent corporation may be directly liable as an "operator" under CERCLA for *its own* actions at a contaminated facility owned by a subsidiary; by contrast, parental liability for actions *by the subsidiary* ordinarily would depend on whether the corporate veil could be pierced. No subsidiary of GenCorp is involved in this case. GenCorp's liability derives from GenCorp's own conduct, not that of any other entity. *Bestfoods* is inapposite for the additional reason that it does not address the standards applicable to CERCLA "arranger" liability. The central lesson of *Bestfoods*—that to be liable directly under CERCLA, an alleged violator must meet the relevant liability standards based on its own conduct—was the very test applied in this case. The imposition of arranger liability here was entirely proper, particularly in light of GenCorp's own substantial involvement in the disposal of hazardous waste from the TDI Plant.

I. GenCorp Waived Any Argument That Olin's Contribution Claim Did Not Satisfy Section 113(f)(1)'s "During Or Following" Requirement.

GenCorp now maintains that Olin's claim for contribution was not made "during or following" a civil action under CERCLA § 106 or § 107(a), as required by CERCLA § 113(f)(1). GenCorp raised this issue in the district court and identified it as a potential ground for appeal in the court of appeals, but GenCorp then elected not to pursue the issue in its briefing on appeal. GenCorp itself admitted in its petition for rehearing below (Pet. for Reh'g at 14) that it made this deliberate choice. GenCorp thus waived any right it may have had to seek further review on this issue here.

Before electing not to argue any Section 113(f)(1) issue on appeal, GenCorp knew that *Cooper Industries* was before this Court on petition for certiorari and that the Court had invited

the Solicitor General to file a brief expressing the views of the United States. GenCorp also knew that the federal government had filed a brief as amicus curiae before the *en banc* Fifth Circuit, arguing in favor of Cooper Industries' position. Nonetheless, GenCorp freely chose not to appeal the district court's judgment on the ground that the "during or following" requirement in Section 113(f)(1) was not satisfied. GenCorp thus waived any right to raise this issue at a later time in the court of appeals or this Court. *See, e.g., Ramani v. Ashcroft*, 378 F.3d 554, 558 (6th Cir. 2004); *Bickel v. Korean Air Lines Co.*, 96 F.3d 151, 153-54 (6th Cir. 1996).

As this Court admonished in *Ackermann v. United States*, 340 U.S. 193, 198 (1950), "free, calculated, deliberate choices are not to be relieved from." Like the petitioner in that case, GenCorp should not be relieved from the consequences of its knowing and deliberate waiver. By not requesting appellate review of any Section 113(f)(1) issue, GenCorp forfeited any opportunity to obtain review of such an issue here. *Auer v. Robbins*, 519 U.S. 452, 464 (1997) ("Since, however, that argument was inadequately preserved in the prior proceedings, we will not consider it here"); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (declining to consider issue not raised properly in the court of appeals).

II. Olin's Contribution Claim Was Made During Or Following A Civil Action Under CERCLA § 107(a).

GenCorp suggests that this Court should decide whether a UAO issued under Section 106 qualifies as a "civil action" within the meaning of Section 113(f)(1). That issue need not be decided here because Olin's contribution claim would be authorized under Section 113(f)(1) in any event.

Unlike the claimant in *Cooper Industries*, Olin had been sued under Section 107(a) for each site before Olin sought contribution from GenCorp. Olin sought contribution for several Superfund sites, the largest being the Big D landfill in

Ashtabula, Ohio, to which wastes from the TDI Plant were transported for disposal. EPA sued Olin under Section 107(a) for that site in 1991, as explained above The other contaminated sites for which contribution was awarded by the district court are Fields Brook (a waterway that flows past and includes the property on which the TDI Plant was located) and the RES landfill (where TDI Plant wastes were deposited). Both Olin and GenCorp were sued by EPA in 1989 under Section 107(a) for the Fields Brook site. In addition, both Olin and GenCorp were sued under Section 107(a) by the owner of the RES site, and the RES site was not added to Olin's contribution claim in this case until after the RES site owner had named Olin and GenCorp as defendants in that litigation. Thus, Olin's contribution claim was made "during" the EPA Section 107(a) action for Big D, and "following" EPA's Section 107(a) action for Fields Brook and Reserve Environmental's Section 107(a) action for RES.

Moreover, Olin's contribution claim was filed as a counterclaim to GenCorp's original declaratory judgment action against Olin, which asserted that GenCorp was not liable under Section 107 or any other part of CERCLA. Because of the pendency of GenCorp's own complaint against Olin, Olin's counterclaim for contribution was filed during—indeed, in—"a civil action under [Section 107]." *See W. Prop. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 685 (9th Cir. 2004) (holding that Section 107 claims and counterclaims in same action satisfied Section 113(f)(1)'s "during" requirement).[9]

GenCorp contends that the prior Section 107(a) actions against Olin somehow do not count under Section 113(f)(1), because the response costs Olin claimed for Big D and Fields

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[9] The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, does not provide federal question jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). To establish subject matter jurisdiction for its declaratory judgment action, GenCorp brought the action under CERCLA and specifically requested a declaration of no liability to Olin under Section 107. GenCorp Compl. ¶ 2 & Count II.

Brook were "not subject to" those lawsuits, but were incurred under the UAOs. Pet. 10-11 & n.2. Nothing in the text of Section 113(f)(1) imposes the kind of limitation that GenCorp advocates. As construed in *Cooper Industries*, the statute simply requires that a contribution claim proceed "during or following" a civil action under Section 106 or Section 107(a), and it is undisputed that, with respect to each of the sites at issue, Olin already had been sued under Section 107(a) before it asserted a contribution claim against GenCorp. That is all that Section 113(f)(1) requires. Moreover, GenCorp mischaracterizes the claims made against Olin in the prior Section 107(a) actions. The government did not, as GenCorp contends, seek to recover only oversight costs. Rather, as documented above, Olin was sued to recover all past and future response costs the government had incurred or would incur in the future at each site. Thus, Olin was "subject to" a judgment in those Section 107(a) actions for all of the cleanup costs at each site.

III. Even If The Section 106 Issue Presented By GenCorp Were Important To The Outcome, Review Would Not Be Warranted Because Neither The Court Of Appeals Nor Any Other Federal Appellate Court Has Decided That Issue.

Not surprisingly, given GenCorp's failure to preserve the point, the court of appeals did not decide the Section 106 issue for which GenCorp now seeks review. This Court ordinarily does not decide questions "not pressed or passed upon below;" the Court will grant review of such a question "only in exceptional cases." *Duignan v. United States*, 274 U.S. 195, 200 (1927). This is not an "exceptional case." Not only has the court below not decided GenCorp's Section 106 issue, but *no* court of appeals has yet ruled on this question. This alone constitutes sufficient reason to deny review. *McCray v. New York*, 461 U.S. 961, 962 (1983) (denying certiorari where "further consideration . . . of the problem by

other courts will enable us to deal with the issue more wisely at a later date" and where "presently no conflict [exists] within the federal system"); *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1976) (endorsing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").[10] Nor can GenCorp claim any prejudice, especially after abandoning the very issue for which it now seeks review. The judgment, after all, merely requires GenCorp to pay its fair share of the cleanup costs associated with the TDI Plant that GenCorp jointly operated with Olin. That is not an outcome that suggests a need for further consideration.

GenCorp argues, however, that granting certiorari would be appropriate here because this Court often considers issues that it has specifically reserved in earlier decisions. Pet. 9. GenCorp relies on three cases, each readily distinguishable.[11] In those cases, unlike this one, the issue for which certiorari was granted had been decided in the judgment under review. None of those cases stands for the proposition that review should be granted to decide an issue the Court reserved previously where, as here, the court of appeals did not address that issue because the petitioner chose not to include it among the grounds for appeal.

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[10] GenCorp (Pet. 13) cites one district court decision, *Pharmacia Corp. v. Clayton Chem. Acquis. LLC*, No. 02-CV-0428, 2005 WL 615755 (S.D. Ill. Mar. 8, 2005), that has addressed the Section 106 issue after *Cooper Industries*, and we have found another such case. *Blue Tee Corp. v. ASARCO, Inc.*, No. 03-5011-CV-SW-F-JG, 2005 WL 1532955 (W.D. Mo. June 27, 2005). Neither involved a situation where, as here, the contribution claimant had been sued under Section 107(a) before pursuing its contribution claim. Both district courts regarded this fact as significant.

[11] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 379-80 & n.6 (1983); *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 402 (1981); and *Warden, Lewisburg Penitentiary v.* Marrero, 417 U.S. 653, 656 (1974).

IV. Contrary To GenCorp's Contention, A UAO Issued Under Section 106 Qualifies As A "Civil Action" Under Section 106 For Purposes Of CERCLA's Contribution Provision.

The term "civil action" is not defined in CERCLA, and it is not a term of art with a precise, technical meaning. Congress easily could have excluded UAOs explicitly from the first sentence of Section 113(f)(1), but it did not do so. Although "civil action" might be read to refer solely to prior litigation—to the exclusion of any other formal administrative proceeding—that approach does not comport with the text, purpose, or structure of CERCLA. The panel majority in *Aviall I* correctly observed that Section 106 specifically contemplates a variety of legal proceedings—administrative as well as judicial—all civil in nature, leading that court to conclude in dictum that UAOs come within the meaning of "civil action" under Section 113(f)(1). *Aviall I*, 263 F.3d at 140 n.5, 145.

In Section 113(f)(1), Congress clearly meant to provide a contribution remedy so that PRPs legally compelled to pay for environmental cleanups would have a clear statutory right to recover a portion of the cost from other PRPs. UAOs provide such compulsion in several ways. A PRP cleaning up a site under a UAO, for example, has no right to challenge the agency's remedy until the work is completed, and even then any such challenge is subject to an "arbitrary and capricious" standard of review. 42 U.S.C. § 9606(b)(2)(D); *Dico, Inc. v. Diamond*, 35 F.3d 348, 351 (8th Cir. 1994). In addition, the penalty for refusing to comply is $25,000 per day under Section 106(b)(1), 42 U.S.C. § 9606(b)(1), as well as treble damages under Section 107(c)(3), 42 U.S.C. § 9607(c)(3), if the government performs the cleanup.

GenCorp's restrictive interpretation of Section 113(f)(1)—excluding UAOs from the term "civil action"—would lead to an incongruous result. It would *discourage* compliance with UAOs by precluding contribution where, after being found

liable by EPA and ordered administratively to clean up a hazardous waste site, a PRP did so without first making the agency sue for injunctive relief, sanctions, or cost recovery. That hardly can be what Congress had in mind, and GenCorp has offered no explanation for why Congress would have devised a scheme that produces such an anomalous result.

Against this backdrop, construing the term "civil action" to include UAOs is not only reasonable, but also is far more consistent with the overall statutory structure than the "litigation only" interpretation GenCorp advances. Nothing in CERCLA suggests that a PRP that has complied with a UAO is somehow less worthy of obtaining contribution than a PRP that refuses to comply and must be sued by the government. Because the term "civil action" is ambiguous, has more than one possible meaning, and, under GenCorp's interpretation, would have highly undesirable consequences for agency cleanup orders, a reading that includes UAOs would keep faith not only with the statutory text but also with CERCLA's role as "remedial legislation . . . [that] should be construed liberally to carry out its purposes." *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996).

V. Even If Olin Could Not Proceed Under Section 113(f)(1), It Could And Did Seek The Same Recovery Against GenCorp Under Section 107(a), And That Is A Further Reason For Leaving The Judgment Undisturbed.

Even if this Court were to disregard the prior Section 107 actions against Olin and conclude that UAOs are not civil actions for purposes of contribution under Section 113(f)(1), there would be no reason to disturb the judgment here. GenCorp totally ignores the implied right of contribution under Section 107(a) recognized in *Key Tronic*, and mistakenly assumes that contribution under Section 113(f)(1) is limited to sums that have been reduced to judgment in a prior Section 106 or Section 107(a) action. Pet. 10.

In *Key Tronic*, the Court unanimously agreed that Section 107(a) "unquestionably provides a cause of action for PRPs to seek recovery of cleanup costs." 511 U.S. at 818.[12] The majority stated that such a right of contribution is implied, while the dissenting Justices concluded that such a right is expressly provided by Section 107(a). *Id.* at 818, 822. There is no indication from this Court's construction of these provisions that the relief available to Olin under Section 107(a) would be any different from that available under Section 113(f)(1). Nor is it likely that Congress would have chosen to leave Olin or other PRPs performing cleanups pursuant to UAOs with no avenue to recover from other PRPs, unless they first forced EPA to take them to court for an injunction compelling compliance. Such a scheme would make no sense. Because Olin is entitled to recover from GenCorp under Section 107(a) if not under Section 113(f)(1), review in this Court of the Section 106 issue now presented by GenCorp is not warranted.

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[12] Although the dissent in *Cooper Industries* urged the Court to decide whether Aviall could recover its costs under Section 107, 125 S. Ct. at 588, the Court declined to do so and left that question for the lower courts on remand. *Id.* at 586. Following that ruling, a number of district courts have allowed PRPs to recover under Section 107(a) where a right of action under Section 113(f)(1) was unavailable. *E.g.*, *Vine St. LLC v. Keeling*, 362 F. Supp. 2d 754, 764 (E.D. Tex. 2005); *Metro. Water Reclamation Dist. of Greater Chicago v. Lake River Corp.*, 365 F. Supp. 2d 913, 918 (N.D. Ill. 2005); *Adobe Lumber, Inc. v. Taecker*, Civ. No. S02-186, 2005 WL 1367065, at *1 (E.D. Cal. May 24, 2005); *Kotrous v. Goss-Jewett Co.*, Civ. No. S02-1520, 2005 WL 1417152, at *4 (E.D. Cal. June 16, 2005); *Viacom, Inc. v. United States*, No. 05-0468, 2005 WL 1902849, at *6 (D.D.C. July 19, 2005); *Ferguson v. Arcata Redwood Co.*, No. C03-05632, 2005 WL 1869445, at *6 (N.D. Cal. Aug. 5, 2005).

VI. GenCorp's Proposed Alternative Procedure—Granting Review, Vacating The Judgment, And Remanding For Reconsideration In Light Of *Cooper Industries*—Is Not Appropriate In The Circumstances Of This Case.

GenCorp's petition did not reach the Court during the pendency of *Cooper Industries* and was not held in abeyance awaiting the outcome of that case. Not only did GenCorp waive any issue about the propriety of Olin's contribution claim under Section 113(f)(1), but the judgment below does not even arguably conflict with *Cooper Industries*, given that Olin already had been sued under Section 107(a) before Olin claimed contribution from GenCorp. Rather than seek remand in light of *Cooper Industries* to address some purported inconsistency, a justification GenCorp does not advance, GenCorp instead seeks to have the judgment remanded for consideration of an entirely different question expressly left open in *Cooper Industries*. This is not the purpose of this Court's "GVR" procedure, however, and applying that procedure in this situation would undermine the criteria laid down by the Court for GVR orders.

The GVR procedure serves the interests of justice by conserving this Court's resources where multiple cases raise essentially the same issue. It enables this Court to consider several lower court decisions before it decides the merits of an issue, and it reduces the potential for unequal treatment that might arise where the particular issue selected for review comes from a case other than the petitioner's. It also permits this Court to flag for the lower courts on remand some arguments that may not have been considered fully before. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Extending the GVR procedure to raise a new issue not decided by this Court, as GenCorp now urges, would promote none of these interests. As demonstrated above, this case does not turn on the question decided in *Cooper Industries* or on the question reserved in that case.

This is not a case in which an accident of timing would deprive a litigant of the benefit of a new rule of law decided after it had pressed for such a rule and lost. GenCorp nevertheless maintains that GVR is appropriate because *Cooper Industries* is an "intervening development," one the courts below had no "opportunity to consider" and which "should have [an] outcome-determinative effect" on this case. Pet. 12. To the contrary, the judgment is in harmony with the holding in *Cooper Industries*; GenCorp has only itself to blame for failing to present any issue under Section 113(f)(1) in its opening brief or reply brief in the court of appeals; and GenCorp in fact did inform the court of appeals of the *Cooper Industries* decision, both in a motion to vacate the judgment and in a reply memorandum in support of GenCorp's rehearing petition.

Under these circumstances, there is no basis for invoking the GVR procedure. The record does not "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" on remand. *Lawrence*, 516 U.S. at 167. Moreover, the equities overwhelmingly favor Olin. *See id.* at 167-68 ("Whether a GVR order is ultimately appropriate depends further on the equities of the case[.]"). GenCorp pursued a "manipulative litigation strategy," *id.* at 168, by abandoning the issue of Section 113(f)(1) eligibility initially, and then abruptly reversing course in hopes of profiting from *Cooper Industries* after that case was decided. More fundamentally, both lower courts correctly concluded that GenCorp bears a significant share of responsibility for the cost of environmental remediation necessitated by waste disposal practices employed at the TDI Plant, which GenCorp jointly operated with Olin. *Cooper Industries* provides no basis for revisiting that result.

VII. GenCorp's Fact-Intensive Claim That It Did Not "Own Or Possess" The Hazardous Waste Generated By The TDI Plant Was Not Presented To The District Court, Was Correctly Rejected By The Court Of Appeals, And Does Not Warrant Further Review.

GenCorp claims that a prerequisite for arranger liability—that the hazardous substances in question be "owned or possessed" by the defendant—was not satisfied in this case because GenCorp did not own the TDI wastes sent to Big D. Pet. 14. The court of appeals considered this argument despite GenCorp's failure to raise it in the district court, Pet. App. 24a, and found that the statutory requirement was satisfied by the extensive control GenCorp exercised over the disposal of hazardous wastes from the TDI Plant. *Id.* at 24a-28a. GenCorp does not dispute the control it exercised; rather, in reliance on *Dole Food*, GenCorp maintains that control is irrelevant to arranger liability under CERCLA. The court of appeals properly rejected this argument, and its decision to apply the ordinary meaning of "own" and "possess" does not warrant further review.

As a matter of statutory construction, the terms "own" and "possess"—which are not defined under CERCLA—should be given their ordinary and established meanings, as the court of appeals recognized. Pet. App. 25a-26a. Webster defines "*possess*" as "to take into one's possession . . . gain control of" and "*possession*" as "the act or condition of having in or taking into one's control or holding at one's disposal." WEBSTER'S THIRD NEW INT'L DICTIONARY at 1770 (1966). Moreover, because "[t]he law, in general, recognizes two kinds of possession: actual possession and constructive possession," BLACK'S LAW DICTIONARY at 1047 (5th ed. 1979), numerous courts have found liability based on constructive ownership or possession for matters both criminal and civil, as the court of appeals noted. Pet. App. 25a-26a. There is no indication that Congress used "own" or "possess" in

CERCLA in some different or narrower sense, and GenCorp has identified no such evidence. The element of "control" is thus inherent in CERCLA's "own or possess" requirement, and the court of appeals rightly concluded that "constructive ownership or possession" suffices for arranger liability. Pet. App. 26a-27a. These conclusions are completely in line with the decisions of other courts of appeals.[13]

The facts found by the district court—and not challenged by GenCorp on appeal—establish that GenCorp's control over the disposal of TDI Plant wastes amounts, at the very least, to constructive ownership and possession of hazardous substances. As demonstrated above, GenCorp approved, funded, and paid for waste disposal arrangements; had responsibility for daily TDI Plant operations, including waste removal; funded efforts to reduce the amount of TDI waste; demanded changes in waste disposal practices at Big D; signed transport documents; and negotiated service orders with waste haulers. Furthermore, given that GenCorp workers collected and drummed wastes at the TDI Plant and loaded the drums onto trucks for transport to Big D, GenCorp personnel were the last to have *actual* possession at the TDI Plant as the hazardous wastes were being hauled off to Big D for disposal. There can be no question that the "owned or possessed" requirement was satisfied here.

GenCorp contends, however, that *Dole Food* precludes consideration of GenCorp's control over waste disposal

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[13] *See, e.g. Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 25 (1st Cir. 2004) (where "broker arranges for the disposal of hazardous waste and it does so by exercising control over the waste, such control can amount to constructive possession of the waste."); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (finding plant manager liable as arranger when he exercised actual control over the plant's hazardous substances); *United States v. Shell Oil Co.*, 294 F.3d 1045, 1057-58 (9th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (declining to impose arranger liability where United States neither exercised actual control over hazardous waste disposal nor had any duty to exercise control).

practices in connection with determining CERCLA arranger liability. *Dole Food* has nothing to do with arranger liability, however, and GenCorp's reliance on that case is misplaced. The Court there construed the phrase "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state" in the definition of an "instrumentality" of a foreign state under the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1603(b)(2). The question was whether, under that statute, a foreign state had to own a majority of the shares of an indirect, second-tier subsidiary for the subsidiary to be deemed an instrumentality of the state, or whether ownership of a majority of the shares of the subsidiary's corporate parent would suffice. The Court determined that "owned" within the meaning of the FSIA requires actual shareholding and cannot be based solely on corporate "control" through a parent company.

This ruling has nothing to do with the proper application of arranger liability under CERCLA. "Possession" was never addressed in *Dole Food* because that term does not appear in the FSIA definition involved in that case. Yet, possession alone suffices for CERCLA arranger liability because (1) ownership is not necessary where the statute expressly covers hazardous substances that are either "owned *or* possessed" by a PRP; and (2) control is, by definition, a component of the meaning of "possessed," as explained above. There is no reason to conclude that the *Dole Food* analysis under the FSIA should govern the interpretation of "owned or possessed" under CERCLA when the language and purposes of the two statutes are entirely different. *See Lorillard v. Pons*, 434 U.S. 575, 584-85 (1978) (concluding that reliance on another statute to construe the one in question "sheds no light on congressional intent" due to "significant differences," where the statute in question provided for "legal or equitable relief," but the other "did not authorize 'legal' relief").

VIII. GenCorp's Reliance On *Bestfoods* Is Misplaced Because *Bestfoods* Did Not Consider CERCLA "Arranger" Liability And, In Any Event, The Court Of Appeals Properly Applied The Teaching Of *Bestfoods*.

GenCorp's contention that the judgment below threatens to usher in some kind of mass "end run" around the liability limits of *Bestfoods* cannot withstand scrutiny. GenCorp misunderstands *Bestfoods* and reads into that decision standards for arranger liability that the Court neither considered nor addressed. The court of appeals properly identified and applied the "central lessons" of *Bestfoods* when it rejected GenCorp's argument on this point. Pet. App. 23a-24a. The court's analysis is amply supported, both factually and legally. Further review is not justified.

Bestfoods concerns CERCLA § 107(a)(*2*)-"operator" liability and does not purport to establish any standards whatever for liability as an "arranger" under Section 107(a)(*3*). The question in *Bestfoods* was whether a corporate parent could be directly liable in its own right as a CERCLA "operator" of a subsidiary's facility, where the showing necessary to pierce the subsidiary's corporate veil could not be made. *Id.* at 63-64 & n.9. The Court concluded that direct CERCLA liability could be imposed for the parent company's own actions in operating a subsidiary's facility, *id.* at 55, provided that the corporate parent itself "manage[s], direct[s], or conduct[s] operations specifically related to pollution" at the facility. *Id.* at 66.

No liability was imposed on GenCorp in this case for pollution at a subsidiary's facility, and GenCorp's appeal did not challenge its liability as an "operator" of the TDI Plant for contamination of the plant site and Fields Brook. *Bestfoods* is therefore not directly on point. GenCorp nonetheless insists that the arranger liability judgment "nullifies" the limits on liability imposed under *Bestfoods*, arguing that (1) the analy-

sis for arranger liability "is analogous to" that for operator liability, and (2) the judgment holds GenCorp liable as an arranger because of a "generalized intent to purchase a product from a supplier," not because of any "actual involvement in arranging for disposal of waste." Pet. 16. Neither argument has merit.

GenCorp's assertion that the standards governing arranger and operator liability are "analogous" is neither explained nor supported by authority. Moreover, it is not correct. For arranger liability, it is not necessary to show that a PRP managed, directed, or controlled operations at a facility where hazardous substances are released, which is the relevant inquiry for operator liability under *Bestfoods*. Rather, as the court of appeals explained, arranger liability requires that the PRP "have some intent to make preparations for the disposal of hazardous waste," an "inquiry [that is] highly fact-driven" because proof of such an intention "may be inferred from the totality of the circumstances." Pet. App. 21a (citations and internal quotation marks omitted). The record is replete with evidence that GenCorp had the requisite intent, including GenCorp's 1962 Agreement with Olin, its approval of TDI Plant designs, specifications, and waste disposal practices, its decisions concerning waste disposal as Olin's equal partner on the TDI Committee, and its funding of waste disposal operations and projects to reduce waste volumes.[14]

GenCorp's second contention is a gross mischaracterization. As demonstrated above, GenCorp's arranger liability was based on an extensive record of GenCorp's actual conduct, over many years, in implementing its business relation-

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[14] If "active involvement" in waste disposal is required, as GenCorp contends, there are ample grounds to find arranger liability under that standard here as well, given that GenCorp employees were responsible for waste removal at the TDI Plant, collected and drummed TDI Plant wastes, loaded the drums onto trucks bound for Big D, and inspected Big D and demanded corrective measures.

ship with Olin. It was not premised on GenCorp's self-serving—and totally misleading—assertion that it was a customer who merely intended to purchase products from a supplier. GenCorp was anything but a mere customer, as the court of appeals recognized in its answer to this argument (Pet. App. 28a):

> [O]ur decision does not mean that mere customers of waste-generating manufacturers or processors will face 'arranger' liability under CERCLA—unless, that is, they exercise control over the hazardous waste and its disposal as GenCorp did in implementing this unique business relationship.

GenCorp's argument that "virtually every customer" must now be concerned about "fac[ing] liability for cleanup costs the supplier later incurs" (Pet. 17) distorts the record and the court of appeals' holding.

The fact that GenCorp did not hire the waste hauler that transported TDI wastes to Big D is beside the point. GenCorp's argument applies an overly restrictive meaning to the phrase "arranged for disposal . . . or arranged with a transporter for transport for disposal" under CERCLA § 107(a)(3). As the court of appeals correctly concluded, GenCorp's disavowal of responsibility for hiring the waste hauler, given the record of GenCorp's extensive involvement in the disposal of waste from the TDI Plant, does not insulate it from arranger liability. Pet. App. 24a. Nothing in *Bestfoods* conflicts with this conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

GENCORP INC.,

Petitioner,

v.

OLIN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTRODUCTION

Whether a unilateral administrative order ("UAO") is a "civil action" that triggers a right of contribution under 42 U.S.C. § 9613(f)(1) is a question with nationwide implications. The Environmental Protection Agency ("EPA") has issued nearly 1,000 UAOs under section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") that are still pending throughout the country. The EPA continues to issue new UAOs at a rate of about forty per year. The pending UAOs affect forty-seven states and involve billions of dollars in environmental cleanup expenses. (*See* Pet. 3.)

Parties subject to the UAOs may, like Olin, incur millions of dollars of cleanup expenses without a judicial proceeding enforcing the UAO, thus raising precisely the question noted and reserved by this Court in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577, 584 n.5 (2004): namely, whether a party like Olin has a contribution action under section 113(f)(1) of CERCLA for recovery of costs incurred under a UAO. This case presents the question squarely. By answering it, this Court can bring certainty to a key aspect of CERCLA enforcement that involves billions of dollars of cleanup costs throughout the nation.

Respondent Olin does not dispute the national importance of this question. Nor does Olin contest that this Court's decision in *Cooper Industries* changed the established law and practice of CERCLA contribution. It is also undisputed that the court of appeals never considered the application of *Cooper Industries* to this action, even though it is well-established that courts must apply the law as it exists while a dispute is pending regardless of whether the party benefiting from the change of the law anticipated it in its prior briefing. Nor, as Olin acknowledges, has any other court of appeals given substantive guidance in light of *Cooper Industries* to the

nearly one thousand parties subject to UAOs on the critical issue of whether a section 113(f)(1) contribution claim exists for recovery of costs incurred under the UAOs. Finally, resolving the question in this case will ensure that a single, post-*Cooper Industries* rule of decision applies uniformly to not only the future costs Olin still seeks to recover on remand, but also to the past costs that are the subject of this appeal. Accordingly, this Court should issue a writ of certiorari or, alternatively, issue a GVR order requiring the court of appeals to address the issue on the merits.

ARGUMENT

I. Whether Olin May Recover in a CERCLA Contribution Action the Costs it Incurred Under a UAO is a Question Properly Before the Court in Light of This Court's New Decision in *Cooper Industries*.

Olin does not contest that the *Cooper Industries* decision was an intervening change in the law of CERCLA contribution, as the Second Circuit recently affirmed. *See Consol. Edison Co. of NY v. UGI Utils., Inc.*, No. 04-2409-CV, --- F.3d ---, 2005 WL 2173585, at *8 n.12 (2d Cir. Sep. 9, 2005). Indeed, before this Court's decision, the only court of appeals decision in the country to reach the same result as this Court (on a divided vote) was ultimately vacated *en banc*. *See Aviall Servs., Inc. v. Cooper Indus., Inc.*, 278 F.3d 416 (5th Cir. 2001) *vacated by* 312 F.3d 677 (2002) (*en banc*). In the trial court, Olin argued that every other court in the country to address the issue before *Cooper Industries*, including the Sixth Circuit in *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 351-52 (6th Cir. 1998), had reached the same result as the en banc Fifth Circuit—precisely the opposite result ultimately reached by this Court. (Olin's Mem. in Opp. to GenCorp's Mot. for Recons. of the Court's May 9, 2002 Mem. Op. in Light of *Aviall*, Nov. 7, 2002, 6-14.)

GenCorp could not waive an argument that arises from a change in the law that occurred while this case was on appeal. The rule that a federal appellate court must "apply the law in effect at the time it renders its decision" dates back to the venerable *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49 (1801). *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974). This reasoning applies to judicial as well as statutory changes in the law. *E.g.*, *Thorpe v. Hous. Auth. of the City of Durham*, 393 U.S. 268, 282 (1969); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 349-50 (1941). Consequently, when an intervening decision of this Court modifies an applicable legal rule, federal appellate courts consider it even if the party seeking to raise the issue did not do so in its initial briefing. *Cf. United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967) (plurality opinion) ("the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground"); *United States v. Pruitt*, 156 F.3d 638, 643 n.1 (6th Cir. 1998) (agreeing to address issue that appellant failed to raise either in the trial court or in appellate briefing, based on the interest of justice); *Brown v. M&M/Mars*, 883 F.2d 505, 512-13 (7th Cir. 1989).

The Supreme Court's decision in *Cooper Industries* is an intervening change in law with dispositive implications for Olin's claims. Olin's claim that GenCorp waived the issue by failing to anticipate that this Court would grant certiorari in *Cooper Industries* and reach a result contrary to established precedent in the lower courts is not only contrary to common sense but also unsupported by any authority. Indeed, none of the cases cited by Olin even address an intervening change in the law. *See Ramani v. Ashcroft*, 378 F.3d 554, 558 (6th Cir. 2004) (waiver based on failure to raise an issue below, no intervening change in law); *Bickel v. Korean Air Lines Co.*,

96 F.3d 151, 153-54 (6th Cir. 1996) (noting that an intervening Supreme Court decision "neither added to, nor made a change in, the law" at issue). Accordingly, the Court should grant a writ of certiorari or, alternatively, issue a GVR order sending the case back for the court of appeals to address the issue substantively. *See Paulussen v. Herion*, 475 U.S. 557, 559 (1986) (vacating decision and remanding for consideration of "intervening change in state law") (per curiam); *Doe v. Delaware*, 450 U.S. 382, 389-90 (1981) (the Court's "uniform practice" is to vacate and remand upon a supervening change in the law) (per curiam); *Addison-Taylor v. United States*, 73 Fed. Appx. 418, 420 (Fed. Cir. 2003) (vacating judgment in light of change in the law).

The court of appeals did not address the effect of *Cooper Industries* in this case, even though GenCorp raised the decision with the court of appeals as soon as this Court issued it. Olin's suggestion that GVR is inappropriate because "there is no reason to believe that the court of appeals would act differently now" (Br. in Opp. 14), mistakenly assumes the court of appeals has already issued a substantive ruling on the issue. It did not. In the order denying GenCorp's petition for rehearing, the court of appeals stated only "that the issues raised in the petition were fully considered upon the original submission and decision of the case." (App. 2a.) Because the issues originally briefed and argued did not include—and could not have included—this Court's subsequent reasoning in *Cooper Industries*, the court of appeals plainly has not yet addressed this question on the merits.[1]

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[1] GenCorp also raised the effect of *Cooper Industries* on this case in a motion to vacate filed after the decision was entered in the court of appeals. (Mot. to Vacate and Remand in Light of the S. Ct.'s Decision in *Cooper Indus., Inc. v. Aviall Servs., Inc.*, Jan. 7, 2005.) The court of

This case also illustrates the practical reason underlying the general rule that an intervening change in the law is not subject to waiver. Any other rule would risk artificially dividing an ongoing case and requiring one set of rules for one portion of the case, and an inconsistent set of rules for the other part of the case. Here, for example, the court of appeals ordered a remand to the district court for further consideration of Olin's claim for future costs. (App. 32a.) Olin's right, if any, to recover these future costs will indisputably be subject to the post-*Cooper Industries* rules of CERCLA contribution. But unless this Court intervenes on certiorari or requires the court of appeals to address the issue under a GVR order, the trial court might conclude (and Olin will certainly argue) that Olin's recovery of past costs is subject to the different set of pre-*Cooper Industries* contribution rules. The well-established rule refusing to recognize a waiver argument in the context of a change of law prevents such an incongruous result.

II. Section 113(f)(1) Creates a Right of Contribution Only for Costs Incurred as a Result of a Prior Civil Action Under Section 106 or Section 107, and Not for Recovery of Costs Incurred Under a UAO.

Olin cannot avoid the effect of *Cooper Industries* by relying upon an action in which the federal government recovered modest administrative oversight costs for the cleanup Olin performed under the UAO. Section 113(f)(1) of CERCLA states that "[a]ny person may seek contribution from any person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 or section 9607(a) of this title." 42 U.S.C. § 9613(f)(1). Contribution, by its nature, requires a

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appeals denied the motion without analysis and without any indication of its view on the merits of this issue. (Order, Jan. 21, 2005.)

pre-existing liability or obligation. *See Centerior*, 153 F.3d at 350-52. Under section 113(f)(1), that liability or obligation must have been determined by a "prior civil action." In this case, there is no civil action that ever established Olin's liability for the costs it incurred under the UAO before Olin sued to recover those costs from GenCorp.[2]

Olin's suggestion that section 113(f)(1) does not require any relationship between the prior civil action and the liability for which a party seeks contribution is not consistent with the statute. By using the legal term "contribution," Congress is presumed to have intended that the term be given its established legal meaning. *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000). Contribution is the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear." *Centerior*, 153 F.3d at 350 (quoting *Blacks Law Dictionary* 328 (6th ed. 1990)). It applies "when two or more persons become liable in tort to the same person for the same harm . . . ." *Id.* (quoting Restatement (Second) of Torts § 886A). Section 113(f)(1)'s requirement of a prior civil action shows the liability for which Congress intended to provide contribution. Olin's suggestion that it is entitled to contribution for costs that were not incurred because of a prior civil action, but simply under a UAO, is plainly inconsistent with the requirements of section 113(f)(1). Under this Court's reasoning in *Cooper Industries*, Olin may

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[2] Olin emphasizes the section 107 action by which the EPA recovered its administrative oversight costs, but fails to mention that those oversight costs totaled only $1,542,541 of the more than $60 million for which Olin seeks recovery in this action.

not recover in a CERCLA contribution action for the costs it incurred in response to the UAO.[3]

III. This Court Should Resolve the Question It Reserved in *Cooper Industries* Because the Facts of This Case Squarely Present It, and Because Both the Government and Private Parties Throughout the Nation Need This Court's Guidance in Spending Potentially Billions of Dollars in Cleanup Expenses.

This case squarely presents the issue reserved in *Cooper Industries* of whether a section 106 UAO is a civil action that triggers contribution rights under CERCLA. Olin does not contest that the issue has national importance. Nor does Olin disagree that early resolution of the issue will provide needed guidance to lower courts, the government and the private parties subject to the nearly 1,000 UAOs pending throughout the country. Indeed, the issue of whether a UAO is a civil action will affect parties throughout the United States who have incurred and continue to incur environmental cleanup costs totaling billions of dollars. As Olin notes, the issue has already arisen twice in litigation that was pending prior to this Court's decision in *Cooper Industries*. (Br. in Opp. 19 n.10.)

Olin's argument that a UAO should qualify as a "civil action" is contrary to the views expressed to this Court by the United States in *Cooper Industries*. (Br. of the United States as *Amicus Curiae* Supporting Pet'r, 22 n.11.) It has also been rejected by the only courts that have addressed the issue in light of *Cooper Industries*. *Blue Tee Corp. v. ASARCO, Inc.*,

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[3] Olin's reference to GenCorp's declaratory judgment action seeking a declaration of non-liability under CERCLA does not improve Olin's position. GenCorp's claim made no effort to recover costs or other damages of any kind under CERCLA. It was simply an action for declaratory relief under the Declaratory Judgment Act. 28 U.S.C. §§ 2201-2202.